

## ARGUMENT

### *STANDARD OF REVIEW*

“This court applies de novo review to the decision of the district court in a habeas corpus proceeding.” *Maples v. Stegall*, 340 F.3d 433, 436 (6th Cir. 2003), quoting from *Harris v. Stovall*, 212 F.3d 940, 942 (6th Cir. 2000).

A federal court may grant a writ of habeas corpus with respect to a state court judgment only where the adjudication of the state claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of facts in light of the evidence. 28 U.S.C. § 2254(d); *Maples v. Stegall*.

Under the “contrary to” clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.

*Williams v. Taylor*, 529 U.S. 362, 412-413, (2000)

If the state court has not adjudicated a petitioner’s federal claim on the merits, the claim is reviewed de novo by the federal courts. *Maples v. Stegall*, p. 246-247; *Washington v. Schriver*, 240 F.3d 101 (2nd Cir. 2001)

Reliability of the identification process is a question of law for the court to decide. *Sumner v. Mata*, 455 U.S. 591 (1982)

**I. PETITIONER IS ENTITLED TO VACATION OF HIS CONVICTION BECAUSE EVIDENCE WITHHELD BY THE STATE VIOLATED HIS RIGHTS TO DUE PROCESS OF THE LAW.**

[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Something is rotten in the state of Denmark. Shakespeare, *Hamlet*, Act I, Scene IV.

The petitioner, John Ewing, discovered after his conviction that the state withheld much evidence that points to a scheme by Detective William Eskridge to ensure that Ewing, even though innocent of any crime, was charged in several rape cases in three Michigan counties. The withheld evidence would have been useful to Ewing because it would have shown the orchestrated effort to frame him, supported his defense of mistaken identity and supported his pretrial motion to suppress his identification in the Culhane case.

Withheld evidence is material to guilt or punishment when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" *United States v. Bagley*, 473 U.S. 667, 682 (1985).

A reasonable probability "that the result of pretrial or trial proceedings would have been different" "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the

defendant's acquittal." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). A "reasonable probability" of a different result is shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial." *Id.* It is irrelevant to determination of a reasonable probability that the Government still has sufficient evidence to convict even if the withheld evidence had been disclosed; Ewing only needs to show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 434-435. If material evidence was withheld, it is never harmless error. *Kyles*, 514 U.S. at 435-436.

Suppressed evidence is material evidence if the evidence is vital to impeachment of government witnesses. *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*. The withheld evidence is material if it "would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well." *Kyles*, 514 U.S. at 445.

To determine materiality, the withheld evidence must be "considered collectively, not item-by-item." *Kyles*, 514 U.S. at 436. In *Kyles*, the Supreme Court criticized the lower court for improperly making "a series of independent materiality evaluations" instead of a "cumulative evaluation" of the evidence. *Kyles*, 514 U.S. at 440-441. Materiality, and thus the likelihood of a different trial